The Power of ‘Appearances’

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Last week the EU Court of Justice (ECJ) replied to Polish Supreme Court’s (SC) preliminary references regarding the independence of judges of its Disciplinary Chamber – a new SC division enjoying significant autonomy from the SC First President, established to deal with violations of judicial ethics and other cases regarding the status of ordinary judges. Judges were appointed to this Chamber at the request of the National Council of the Judiciary (NCJ), whose members were elected in 2018 by the ruling parliamentary majority, mainly from among the judges having close connections to the current Minister of Justice. The legal chaos caused by the 2016-2018 ‘reforms’, which increased the executive’s control over the judiciary, and the capture of the Constitutional Tribunal by the ruling party pushed ‘old’ SC judges to look for remedies from the ECJ.

The main proceedings before the SC concerned an appeal brought by judges of the SC and Supreme Administrative Court against negative opinions of the NCJ on their suitability to stay in the office despite reaching the recently lowered retirement age. The applicants claimed that the negative opinions violated their rights under EU Directive 2000/78 on equal treatment in employment. They lodged their appeal with the Labour Chamber instead of the Disciplinary Chamber, even though it was the latter that formally had jurisdiction to hear the case. Examining the admissibility of the appeal and its own jurisdiction, the Labour Chamber referred the case to the ECJ, asking whether it should accept the case as the Disciplinary Chamber may not satisfy the requirements of judicial independence under Article 47 of the EU Charter of fundamental rights and Article 19(1) TEU.

A risky strategy

In theory, the ECJ could have adopted a few different strategies. It could have laid down minimum standards for the national systems of judicial appointment. In fact, this strategy was chosen by AG Tanchev. AG Tanchev proposed to the ECJ a largely syllogistic or deductive reasoning, which is the most common mode of reasoning among lawyers. He tried to infer from the concepts of independence and impartiality, enshrined in Article 47 of the EU Charter, some allegedly objective standards of judicial independence that any legal system should follow. He held, in particular, that the requirement of judicial independence implies the independence of a body tasked with judicial appointments (para. 118), such as the Polish NCJ. Then, relying on CoE reports, soft law and ECHR case law, AG Tanchev prescribed in the abstract the necessary attributes of judicial councils, including freedom from the political branches, the composition by at least the majority of judges elected by their peers from all levels of the judicial hierarchy, a fixed term of office not overlapping in time with that of the parliament. AG Tanchev immediately made an important caveat to these, arguably, far-reaching standards. He held that the Member States have discretion to choose whether to establish a judicial council or not. He nonetheless

concluded that ‘if such a council is established, its independence must be sufficiently guaranteed, *inter alia*, through such provisions’ (para. 129).

AG Tanchev’s strategy was very risky as it could have had repercussions for the organisation of judiciary in other EU Member States, in which the political branches have an important say on judicial appointments or the appointment of judicial councils (Spain, Austria, Germany, Ireland). Suffice it to note that the procedures for judicial appointments and the composition and competences of judicial councils vary considerably across Europe, reflecting deeply rooted conceptions of balance between the political and judicial power. Some political influence on the process of judicial appointments and promotion should not be considered unacceptable in and of itself, as it may provide the judge with necessary democratic legitimacy, transparency and accountability. There are significant doubts regarding leaving judicial appointments in the hands of judicial councils. Research highlights negative aspects of introducing judicial councils to Central and Eastern Europe (see here and here).

A more deliberative approach

As predicted by commentators, the ECJ confirmed its competence to rule on the independence of national courts when they apply EU law. But it opted for a more complex deliberative and balancing approach, largely based on the concept of the ‘appearances’ of independence, drawn from the case law of the ECtHR (as suggested on this blog). This concept is based on the idea that, since it is impossible to get to know the deep and real motives behind judges’ decisions, the best we can do is, among other things, to set up a procedure for judicial appointments and removals that ‘cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges’ (para. 134). The ECJ held that it is necessary to consider and balance all controversial circumstances surrounding the appointment of judges to the Disciplinary Chamber and decide whether, taken together, they justify objective doubts in the minds of reasonable citizens as to the Chamber’s independence (paras. 142 and 146, 152-153). In other words, a court assessing the Disciplinary Chamber must put itself in the position of a reasonable citizen, a member of democratic society who may be subject to judicial power but who is not directly involved in the political process or does not exercise power as a member of government or parliament. The court must consider objective, rationally justified and evidence-based doubts only as to the judicial independence. Such doubts may result from the law and practice of setting up the Disciplinary Chamber.

The examination of the ‘appearances’ of independence must be contextual. It requires in-depth knowledge of all the circumstances surrounding the setting up of the Disciplinary Chamber and the NCJ. This is arguably one of the reasons why the ECJ delegated the task to the referring court. The ECJ itself referred in this respect to the division of tasks in the preliminary reference procedure, in which the ‘interpretation’ of EU law falls to the ECJ and its ‘application’ to the referring court (paras. 77, 84, 98, 103, 118, 132). We find these arguments not entirely

convincing. In the judgment, the ECJ did not add much beyond its previous case law on the meaning of judicial independence. The majority of its reasoning is in fact devoted to drafting a 'preparatory judgment' for the referring court. The ECJ carefully explains how the test of 'appearances' could be applied in practice; which factual circumstances should be assessed and how (para. 135-154). The core of the judgment is therefore much closer to the 'application' rather than 'interpretation' of EU law. The referring court can now also confine itself to confirm and slightly develop the 'preparatory judgment' provided by the ECJ.

Constitutional pluralism

A more important reason why the ECJ delegated the contentious issue back to the referring court may be the need to preserve institutional and constitutional pluralism and to avoid '[the tyranny of values]'. Had the ECJ decided by itself that the Disciplinary Chamber did not provide sufficient appearances of independence, it would have sent a strong signal that the involvement of political branches in judicial appointments is per se problematic under EU law. This could give raise to preliminary references from other countries and, at some point, encourage an ECJ-led harmonisation of national judicial organisation. It could then provoke counter-claims based on 'constitutional identity' arguments.

Moreover, had the ECJ applied the test of 'appearances' on its own, the impact of the judgment could have been paradoxically narrower, as applicable to the Disciplinary Chamber only. Due to the strategy chosen by the ECJ, the EU test for the 'appearances' of independence can now be applied by 'old' Supreme Court judges also to assess the independence of the Chamber for Extraordinary Control and Public Affairs, the second chamber set up in the same way, from scratch, by the ruling parliamentary majority. Arguably, the test can also be applied to 'new' SC judges appointed to other chambers as well as to 'new' judges of lower courts, although it is not evident that the mere appointment of such judges with the involvement of the current NCJ is sufficient to state the lack of appearances of independence. (In the case of Disciplinary Chamber or the Chamber for Extraordinary Control and Public Affairs the problems are broader: whole highly autonomous chambers of the Supreme Court are set up from scratch, in a highly politicised procedure, and full jurisdiction in a crucial area of judicial ethics and general elections are assigned thereto.) Last but not least, parties whose case has been decided by a judge appointed at the request of the current NCJ may also apply to re-open proceedings and obtain damages. Since the ECJ judgement touched upon a very essential element of fair trial, which is a lawful composition of the court, its consequences for closed proceedings go further than in case of violation of substantial or procedural rules. It seems therefore that the test of 'appearances' chosen by the ECJ may have tremendous firepower, even though the ECJ did not settle the issue of Disciplinary Chamber on its own.

Some commentators expected that the ECJ would square the national debate on the said judicial 'reforms'. At the end of the day, the judgement sparked mixed comments in Poland. Some said that the ECJ washed its hands of the politically controversial matter. Some officials of the ruling party portrayed the judgment

as their victory, highlighting that the ECJ had not questioned on its own the independence of the Disciplinary Chamber and, instead, had confirmed that the organisation of the judiciary is an internal matter of a Member State. Moreover, the NCJ announced that the ECJ judgement did not contest its status, that the follow-up judgment of the SC would concern only *the individual cases in which the Labour Chamber made the preliminary references* and that the SC is generally not empowered to contest the status of other constitutional authorities with the *erga omnes* effect. The First President of the SC, on the contrary, held that the ECJ had shared the SC's concerns. However, she called other authorities and courts to wait for the follow-up judgment to avoid 'legal chaos'. At the same time, the Disciplinary Chamber seems to be carrying on its business as usual. Meanwhile, one of the recently appointed judges of the SC is trying to reverse the impact of the ECJ judgement and put in question the appearances of independence of 'old' SC judges before the Constitutional Tribunal. There is also early information about the Minister of Justice taking action against an ordinary court judge who sought to apply the ECJ's test to assess the independence of a lower court judge appointed at the request of the current NCJ.

All in all, the good news is that the ECJ gave to all Polish courts a powerful tool to ensure each citizen's right to a fair trial before an independent judge, without undermining the systems of judicial appointments in other Member States. The bad news is that the test of appearance may easily be misused or abused. Rather than closing, the ECJ judgement opened a new chapter of the saga about judicial independence in Poland. The next chapter will be arguably marked by the ECJ's judgment in the infringement case regarding the Polish regime of disciplinary proceedings for judges.
